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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: EAC 99 217 54270

Office: VERMONT SERVICE CENTER

Date: 11 JAN 2002

IN RE: Petitioner:
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

IN BEHALF OF PETITIONER:

Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was denied by the Director, Vermont Service Center. The director's decision to deny the petition was affirmed by the Associate Commissioner for Examinations on appeal. The matter is now before the Associate Commissioner on a motion to reopen. The motion will be granted. The petition will be denied.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the filing date of the visa petition. The Associate Commissioner affirmed this determination on appeal.

On motion, counsel submits a brief and additional documentation.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's filing date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's filing date is January 21, 1997. The beneficiary's salary as stated on the labor certification is \$17.43 per hour (35 hour week) or \$31,722.60 per annum.

The Associate Commissioner affirmed the director's decision to deny the petition, noting that the petitioner had not submitted evidence of its ability to pay the proffered wage as of the filing date of the petition.

On motion, counsel submits another copy of the petitioner's 1997 Form 1120S U.S. Income Tax Return for an S Corporation and a copy of the petitioner's 1998 Form 1120S and argues that:

The Acting Director denied the appeal advising that other assets of individual stockholders could not be included and nonrecurring start up expenses could not be used for this purpose, nor was credence given to unaudited financial statements.

It is respectfully submitted that a review of the 1997 IRS Form 1120S demonstrates an availability of funds in which to pay the prevailing wage of \$31,722.60.

A review of Schedule L lines 10A and B indicate depreciation deductions for buildings and other depreciable assets less annual accrued depreciation. Column D indicates a remaining depreciation figure of \$190,395.00.

It is respectfully submitted that these depreciation figures demonstrate sufficient resources to pay the salary of 31,722.60 as accounting principles recognize that depreciation is a "paper" deduction with actual funds remaining available for use by the taxpayer.

Counsel's argument is not persuasive. A review of the 1997 federal tax return shows that when one adds the depreciation and the ordinary income, the result is -\$8,040, less than the proffered wage.

Counsel further asserts that "the subsequent tax years indicate sufficient resources on the part of the petitioner to pay the salary."

Counsel submitted a copy of the petitioner's 1998 Form 1120S U.S. Income Tax Return for an S Corporation in support of this assertion. The federal tax return reflected gross receipts of \$911,548; gross profit of \$571,738; compensation of officers of \$18,200; salaries and wages paid of \$42,207; depreciation of \$34,550; and an ordinary income (loss) from trade or business activities of \$70,230. Schedule L reflected total current assets of \$22,116 with \$6,305 in cash and total current liabilities of \$37,277.

A review of the 1998 federal tax return shows that when one adds the depreciation and the ordinary income, the result is \$104,780, an amount sufficient to pay the proffered wage.

The petitioner, however, must show that it has the ability to pay the proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Based on the evidence submitted, it cannot be found that the petitioner had sufficient funds available to pay the beneficiary the proffered wage at the time of filing the application for alien employment certification as required by 8 C.F.R. 204.5(g)(2). Therefore, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden.

ORDER: The Associate Commissioner's decision of March 12, 2001, is affirmed. The petition is denied.